



INTERIOR BOARD OF INDIAN APPEALS

Estate of Emery McCoy Red Feather, Sr.

41 IBIA 320 (10/31/2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF EMERY McCOY
RED FEATHER, SR.

: Order Vacating Denial of Rehearing
: and Affirming Determination
: of Heirs as Modified
:
: Docket No. IBIA 04-44
:
: October 31, 2005

This is an appeal from a December 10, 2003 order by Administrative Law Judge Marcel S. Greenia (ALJ) denying rehearing in the estate of Emery McCoy Red Feather, Sr. (Decedent), deceased Rosebud Sioux Indian, Probate No. IP GP 345 0044. That decision let stand an August 26, 2003 order determining heirs and decreeing distribution. For the reasons stated below, the Board of Indian Appeals (Board) vacates the order of December 10, 2003 denying rehearing and affirms the ALJ's order of August 26, 2003, as modified by this decision.

Background

Decedent died intestate on June 15, 2001 at Porcupine, South Dakota. Decedent was survived by three children: Delia Vina Red Feather; Emery Red Feather, Jr.; and Patrick Ernest Red Feather, Sr.

On April 15, 2002, after Decedent's death but before probate proceedings began, Patrick Ernest Red Feather, Sr. died. This appeal involves a dispute regarding the heirs of Patrick Sr. There is no dispute that he was the father of one son, Patrick Emery Red Feather, Jr. There is a dispute as to whether he was the father of another son, Ernie Red Feather, and a daughter, Sage Red Feather. Appellants in this appeal are Patrick Jr. and his mother, Sheris Red Feather, who was the wife of Patrick Sr.

The ALJ held a probate hearing on May 20, 2003, at Pine Ridge, South Dakota. Patrick Jr. was represented by an attorney at the hearing. The attorney stated that Patrick Jr. disputed that Sage and Ernie were the children of Patrick Sr. Although Patrick Sr. had signed paternity affidavits for Sage and Ernie, the attorney argued that, under tribal law, a married man cannot sign a paternity affidavit without the permission of his wife. The attorney stated

that the issue of paternity was being litigated in the Ogala Sioux Tribal Court. The ALJ stated that he would wait for the tribal court to determine paternity. Transcript at 7.

On August 26, 2003, the ALJ issued an Order Determining Heirs and Decree of Distribution. In the portion of the order identified as “Findings of Fact and Conclusions of Law,” the ALJ provided a description of Decedent’s “Family History.” In that discussion, the ALJ addressed the paternity question regarding Patrick Sr. The ALJ declared that “Patrick was the father of three (3) children, namely: Patrick Emery Jr., Sage, and Ernie Red Feather, all of whom survive the Decedent.” The ALJ concluded that paternity affidavits signed by Patrick Sr. for Sage and Ernie established paternity by a preponderance of the evidence. In a Memorandum of Law accompanying the opinion, the ALJ found there was no tribal law that precluded reliance on the paternity affidavits.

The order then proceeded to “Order[] and Decree[]” that the estate pass in one-third equal shares to Delia Vina Red Feather, Emery Red Feather, Jr., and the Estate of Patrick Ernest Red Feather. ^{1/} The order directed BIA to distribute the estate accordingly. This portion of the order did not identify or refer to the children of Patrick Sr.

Appellant Sheris Red Feather filed a timely petition for rehearing of the August 26, 2003 decision. She questioned the legal validity of the paternity documents, argued that certain evidence suggesting uncertainty by their mother about the paternity of Sage and Ernie should have been submitted, contended that she was prevented from submitting evidence regarding paternity at the hearing, and argued that the paternity question should be resolved by the tribal court.

On December 10, 2003, the ALJ issued an Order Denying Petition for Rehearing. The ALJ concluded that Appellant raised no new arguments and presented no new evidence as to the paternity of Sage and Ernie. In an attached memorandum of law, the ALJ also noted that Appellant had provided no documentation that she had filed a complaint disputing paternity in the Ogala Sioux Tribal Court and had not been prevented from presenting evidence to dispute paternity at the probate hearing. The ALJ concluded that Appellant’s contention that the ALJ lacked authority to determine paternity in probate proceedings on Indian trust land was legally incorrect.

Appellants filed a timely appeal with the Board and set forth arguments in a brief.

^{1/} The order determined that, by federal statute, all of Decedent’s land interests may be subject to a requirement that heirs or devisees be members of the Standing Rock Sioux Tribe or a federally recognized tribe or otherwise be recognized as Indians by the Secretary of the Interior.

Discussion

Appellants argue for the first time on appeal that the ALJ went beyond his authority in determining the heirs of Patrick Sr. They argue that only Decedent's estate is at issue in this probate proceeding, and that the heirs of Patrick Sr. should be determined in a separate proceeding on his estate. They note the probate of the estate of Patrick Sr. was not consolidated with the probate of Decedent and that no notice was provided that the heirs of Patrick Sr. would be determined in this proceeding.

The Board typically does not consider issues raised for the first time on appeal. See Estate of Jesse Jay Kirn, 41 IBIA 113, 116 n.3 (2005). However, the Board makes an exception to this general rule for matters concerning jurisdiction. See Estate of Glenn Begay, 16 IBIA 115, 118 (1988); Estate of James Wermy Pekah, 11 IBIA 237, 241 (1983). Here, because Appellants' argument amounts to a contention that the ALJ lacked jurisdiction to determine the heirs of Patrick Sr., the Board will consider this argument.

The Board concludes that Appellants are correct that the ALJ lacked jurisdiction to determine the heirs of Patrick Sr. This proceeding pertains only to the Estate of Emery Red Feather, Decedent. Public notice of the probate hearing indicated only that the Estate of Emery Red Feather was the subject of the hearing. It is immaterial that Patrick Sr. died after Decedent's death. Inheritance is determined as of the time of a decedent's death. See Estate of Patrick Church, Jr., 26 IBIA 145, 146 (1994). Thus, the only question before the ALJ with regard to Patrick Sr. is whether he was an heir of Decedent.

Although the Board concludes that the ALJ incorrectly addressed the question of the heirs of Patrick Sr., the order of August 26, 2003, determining heirs does not, in its ultimate ruling, determine Patrick Sr.'s heirs or order distribution of Decedent's estate to them. The operative portion of the order merely identifies the estate of Patrick Sr. as an heir, which no one disputes to be incorrect, and orders distribution of a one-third share of Decedent's estate to that estate. The formal order, therefore, operates within the proper bounds of the jurisdiction of these probate proceedings.

Thus, the Board affirms the ALJ's August 26, 2003 order with the modification that any and all findings of fact or conclusions of law pertaining to the heirs of Patrick Ernest Red Feather are stricken from the order. 2/ The Board also vacates the December 10, 2003 order

2/ The August 26, 2003 order is accompanied by Form OHA-7, Data for Heirship Finding and Family History, which is signed by the ALJ. This form identifies the children of Decedent's deceased children to be Patrick Jr., Sage, and Ernie. To the extent that this form may be deemed to have any legal effect, this portion of the form is modified to strike the determination regarding the children of Patrick Sr.

denying rehearing which in its entirety addresses matters that are not within the jurisdiction of these probate proceedings.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the order of December 10, 2003, denying rehearing and affirms the order of August 26, 2003 as modified.

I concur:

// original signed
Katherine J. Barton
Acting Administrative Judge

// original signed
David B. Johnson
Acting Administrative Judge